Supreme Court, U.S.
FILED

No. 09-1382 MAY 7 - 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

KRIS ALAN HAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Kris Alan Hahn
223 14th Avenue NE
Minneapolis, MN 55413

Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Does a district court acquire jurisdiction by the parties waiving jurisdiction in cases involving indictment by grand jury?

II. Are the federal circuit courts of appeals bound by United States Supreme Court precedent?

PARTIES BELOW

Petitioner Kris Alan Hahn was the Petitioner-Appellant in the court below. Respondent United States of America was the Respondent-Appellee in the court below.

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No. _____

In The
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KRIS ALAN HAHN,
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UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
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For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Kris Alan Hahn, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, filed on February 16, 2010. There was no good-faith determination of the law in petitioner's case in either the district court or the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The unreported Court of Appeals' order denying the petition for rehearing and for rehearing en banc was entered on February 16, 2010 and is reproduced at Pet. App 1a. The unreported Court of Appeals'

Judgment denying the application for certificate of appealability was entered on December 17, 2009 and is reproduced at Pet. App 2a. The District Court's memorandum opinion and order denying Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence was entered on July 1, 2009 and is reproduced at Pet. App. 3a-15a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment, denial of petition for rehearing and for rehearing en banc, was entered on February 16, 2010.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

The Fifth Amendment, U.S. Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 2253, 28 U.S.C. § 2255, and Federal Rule of Criminal Procedure 7(b).

Title 28 U.S.C. § 2253 provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Title 28 U.S.C. § 2255 provides:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as

from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint

counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule of Criminal Procedure7(b) provides:

(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prose-cution by indictment.

STATEMENT OF THE CASE

In as few words as possible, the situation in Petitioner's criminal case was this:

1. Petitioner was never indicted by a grand jury.

2. The lower court apparently "acquired" jurisdiction by Petitioner *waiving* jurisdiction—on the advice of his attorney—pursuant to Federal Rule of Procedure 7(b).

REASONS FOR GRANTING THE WRIT

The Writ must be granted because both the federal district court and the Eighth Circuit Court of Appeals ignored *this* Court's precedent spanning three (3) centuries.

The Writ must be granted because, if it is not, then this Court's precedent on the issue becomes completely meaningless.

I. A federal court cannot acquire jurisdiction simply by the parites waiving jurisdiction.

[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099, 2104 (1982) (citations omitted).

The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. *Owen Equip. & Erection Co. v. Kroger*, 98 S.Ct. 2396, 2403 (1978).

A defendant may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court. *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 828 (1904).

Litigants cannot confer subject matter jurisdic-tion by agreement. *American Policyholders Inc. v. Nyacol Products*, 989 F.2d 1256, 1258 (1st Cir. 1993) (citations omitted).

[A] party can challenge the court's jurisdiction at anytime. *United States v. Barragan-Mendoza*, 174 F.3d 1024, 1027 (9th Cir. 1999).

A jurisdictional claim can never be waived (through forfeiture or even through purposeful waiver). *United States v. Baucum*, 80 F.3d 539, 541 (D.C. Cir. 1996).

Federal courts are not at liberty to overlook

limitations on their subject matter jurisdiction. *Francis v. Goodman*, 81 F.3d 5, 8 (1st Cir. 1996) (citation omitted).

Jurisdiction is not waived by a guilty plea. *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

A federal rule cannot be the basis of original jurisdiction. *Milan Exp., Inc. v. Averitt Exp., Inc.*, 208 F.3d 975, 979 (11th Cir. 2000).

Which is exactly what the prosecutor did in the instant case: attempt to acquire jurisdiction by the sumptuous use of Federal Rule of Criminal Procedure 7(b).

> **(b) Waiving Indictment.** An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

Note the language, *"waives prosecution by indictment,"* not "waives *charging* by indictment." Here there was no indictment to waive.

Congress was without authority to enact Fed-eral Rule of Criminal Procedure 7(b) nor do the Courts have the authority to recognize it.

The law concerning indictment by grand jury and the *necessity* of an indictment *before* that indictment can be waived is equally clear.

Without an indictment or a presentment by a grand jury the district court exceeds it jurisdiction. *Ex Parte Wilson*, 5 S.Ct. 935, 937 (1885).

> A party cannot waive a constitutional right when its effect is to give a court jurisdiction....

> The fifth amendment to the Constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, provides for a requisite to jurisdiction...
>
> *Ex Parte McCluskey*, 40 Fed. 71, 74 (C. Ct. D. Ark. 1889) (citations omitted).

The absence of a valid waiver and lack of indictment is a defect affecting jurisdiction. *United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996).

[S]erious criminal offenses...can be prosecuted only by indictment. *Schick v. United States*, *supra*, 24 S.Ct. at 827.

Infamous crimes must be proceeded against on grand jury indictment. *Brede v. Powers*, 203 U.S. 4, 8 S.Ct. 44 (1923).

I.e., even if Federal Rule of Criminal Procedure 7(b) were enacted within the enumer-ated powers given to Congress (which it was not, *infra*), for a waiver to be valid the *facts* would have had to have been investigated *first* and an indictment *returned*.

Where a valid indictment has already been obtained, a defendant's decision to plead to a superseding bill of information includes an impli-cit waiver of indictment that satisfies Rule 7(b). *United States v. Gaudet*, 81 F.3d 585, 590 (5th Cir. 1996).

It is well known that any ambiguity concern-ing criminal statutes is to be resolved in favor of the accused. See, *e.g.*, *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Smith v. United States*, 360 U.S. 1, 9 (1959).

No act of Congress can authorize a violation of the Constitution. *United States v. Brigoni-Ponce*, 95

S.Ct. 2574, 2587 (1975).

Any modification of the indictment by grand jury clause of the Fifth Amendment is, for all practical purposes, an amendment to the Consti-tution.

[Congress]...is not given power by itself...to amend the constitution. *Myers v. United States*, 47 S.Ct. 21, 37 (1926).

Congress [may not] change the meaning of the Constitution through the passage of ordinary legislation. *In re Young*, 141 F.3d 854, 859 (8th Cir. 1998).

Did this bill become a law in the manner prescribed by the Constitution? *Portland Gold Mining Co. v. Duke*, 191 Fed. 692, 696 (8th Cir. 1911).

The legislature cannot enact laws for accomplishments of objects not entrusted to the federal government. *Linder v. United States*, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed 819 (1925).

> [P]rinciples of law, whether embodied in the Constitution and laws of the United States, the Federal Rules of Civil Procedure or the local rules of a district court, must remain fixed and secure. The strictures governing court and prosecutor alike are designed to insure that the processes of criminal justice are carried out with care and deliberation, for were the law applied casually and without thought, the result would not be justice, and the enforcers of the law would become merely the custodians of power.
>
> *McCarthy v. Manson*, 554 F.Supp. 1275, 1279 (D. Conn. 1982).

II. Must Supreme Court precedent be followed by the lower courts or may the lower courts simply ignore Supreme Court precedent when they choose to do so?

It would appear that the district court in this action has "overruled" Eighth Circuit precedent.

> *See United States v. Taylor*, 519 F.3d 832, 836 (8th Cir. 2008) (noting that "[a] guilty plea waives all non-jurisdictional defenses," unless, with the consent of the court and the government, the plea is expressly conditioned on the right to appeal the denial of a specified pre-trial motion); *see also United States v. Cotton*, 535 U.S. 625, 631 (2002) (concluding that a defective indictment does not deprive a court of jurisdiction); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (noting that the failure to return an indictment in open court as required by Rule 6(f) is merely a non-jurisdictional, procedural defect).
>
> *United States v. Clarkson*, 321 Fed.Appx. 534 (8th Cir. 2009).
>
> We are somewhat disadvantaged because subject-matter jurisdiction was not challenged in the district court, and the court made no findings on this issue. Questions of subject-matter jurisdiction, of course, may be raised at any time and may not be waived. *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). A court, including an appellate court, may raise the issue *sua sponte* and, indeed, the court has the duty to do so if

the record suggests jurisdiction is lacking. *Id.*

Yeldell v. Tutt, 913 F.2d 533 (8th Cir. 1990).

> Jurisdiction is always the first issue to decide; for without the power to hear an action and to execute a decision the sitting tribunal is actually not a court at all. In the overview, courts stay within the legislatively determined limits so that their power is properly used for the citizenry. The overstepping of the jurisdictional limits can lead at least to confusion, at the worst to a corruption of the granted power. Here we have confusion. Such underlying principles on the limits of jurisdiction must continually be realized when dealing with the individual case, for minor inroads to necessary and established principles may destroy the principles a slight step at a time.
>
> Concededly, if the District Court lacked jurisdiction to hear this case, the parties cannot waive jurisdiction by proceeding to a hearing on the merits. *Ahrens v. Clark*, 335 U.S. 188, 193, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948); *United States v. Sahli*, 216 F.2d 33, 37 (7th Cir. 1954).
>
> *Lee v. United States*, 501 F.2d 494 (8th Cir. 1974).

Petitioner has demonstrated the issue. Now this Court needs to demonstrate that it "means what it says."

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.
>
> *Rodriguez De Quijas v. Shearson American Express, Inc.*, 490 U.S. 477, 484 (1989).

Note that, in this case, the Eighth Circuit Court of Appeals also overruled (or ignored) its *own* precedent.

CONCLUSION

Either the parties to an action may waive jurisdiction to give jurisdiction or they may not.

Either this Court issues binding precedent or it does not.

Which is it?

Only this Court can say.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Kris Alan Hahn
223 14th Avenue NE
Minneapolis, MN 55413

Pro se Petitioner

Dated: _____, 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2946

Kris Alan Hahn,
Appellant,

v.

United States of America,

Appellee.

Appeal from U.S. District Court for
the District of Minnesota - Minneapolis
0:09-cv-00675-MJD

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 16, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2946

Kris Alan Hahn,
Petitioner - Appellant

v.

United States of America,
Respondent - Appellee

Appeal from U.S. District Court for
the District of Minnesota - Minneapolis
(0:09-cv-00675-MJD)

JUDGMENT

Before SMITH, BOWMAN, SHEPHERD, Circuit Judges

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 17, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

Crim. File No. 08-95 (MJD)
Civil Case 0:09-cv-00675-MJD

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

KRIS ALAN HAHN,
Defendant/Petitioner.

MEMORANDUM OPINION AND ORDER

Jeffrey S. Paulsen and Tricia A. Tingle, Assistant U.S. Attorneys for Plaintiff/Respondent.

Kevin M. O'Brien, Counsel for Defendant/Petitioner.

I. INTRODUCTION

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 32) and his Motion to Recuse [Doc. No. 36].

II. BACKGROUND

On March 25, 2008, a felony information was filed charging Petitioner with one count of production of child pornography in violation of 18 U.S.C. §§ 2251(a) and 2251(e). On April 29, 2008, Petitioner entered into a Plea Agreement by which he pleaded guilty to

the one-count information.[1] At the Plea Hearing, Petitioner confirmed that he understood that he was being charged by Information, and that he understood he had the right to have a grand jury determine whether probable cause existed as to the charge of producing child pornography. (Plea Transcript, p. 4.) He orally waived his right to a grand jury, and he also signed a written waiver of Indictment. (*Id.*)

Pursuant to the terms of the Plea Agreement, the parties agreed that on or before December 6, 2006, the Petitioner enticed K.S.H., a minor over the age of 12, to pose for photographs which lasciviously displayed her genitals or pubic area. (P.T., p. 20.) The parties further agreed that the Petitioner took the pictures and that he later sent the pictures to K.S.H. over the internet. (*Id.*) The parties also stipulated to certain sentencing guideline calculations. The Petitioner also specifically acknowledged that he would receive a sentence of at least 180 months, because of the applicable statutory mini-mum sentence. (*Id.*, p. 6, 9.) At the Plea Hearing, the Court inquired as follows:

> Q: Well, understand that if you enter a plea here and I accept it, the mandatory minimum sentence is at least 15 years, 15 years is the starting point, it does not go below that. Do you understand that?
>
> A: Yes, I do.

(P.T. p. 10.)

---

[1] The Petitioner was first charged in state court with Criminal Sexual Conduct in the First Degree for having sexual intercourse with the minor victim K.S.H. Bauer also represented Petitioner on that charge.

During his plea colloquy, Petitioner was questioned as to whether he understood and agreed to the terms of the Plea Agreement. The Petitioner responded that he did understand the terms and agreed to such terms. (Id .. p. 12.) The Petitioner was also extensively advised of the constitutional rights that he would give up by entering into a guilty plea. (*Id* .. p. 12-14.) The Court also inquired of the Petitioner as to whether he received any threats or promises in exchange for his plea of guilty, to which he responded "No, sir." (*Id.* p. 16.)

Thereafter, the Petitioner confirmed that he was knowingly, voluntarily and intelligently waiving those rights. (*Id.* p. 18.) To ensure that the plea was knowing and voluntary, the Court inquired of Petitioner as to whether he was taking any prescription medications, and if so, what medications he was currently taking. In response, the Petitioner indicated that he took medication for high cholesterol, GERD, aspirin and Tylenol. (P.T. p. 16.) The Court asked the Petitioner if he was clearheaded, to which he responded "Yes I am." (*Id.* p. 17.)

On January 23, 2009, Petitioner was sentenced to a term of imprisonment of 210 months, which was the high end of the applicable advisory guideline range.

Petitioner now brings this *pro se* motion to vacate, set aside or correct his sentence arguing: (1) ineffective assistance of counsel; (2) the district court was without jurisdiction to accept Petitioner's guilty plea; and (3) Petitioner's plea was not knowing and voluntary. Shortly after filing this habeas petition, Petitioner filed a motion to recuse. The basis for this motion is that his defense counsel, Thomas Bauer, allegedly told him that the prosecutor called him in tears as she was upset over the way the federal prosecutor's office was going handle this matter, and

because Bauer allegedly told him that Bauer was aware of this Court's position on pornography, and that Bauer had in fact watch pornographic movies with the Court.

The Court appointed counsel for Petitioner with respect to his motion to recuse and his habeas petition. Despite the appointment of counsel, the Court has agreed to consider Petitioner's *pro se* motions and memoranda filed in support thereof.

III. DISCUSSION

A. Motion to Recuse

Standard

Title 28 U.S.C. § 455 provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding ...

The Eighth Circuit has determined that disqualification under § 455 is required "if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *United States v. Tucker*. 78 F.3d 1313, 1324 (8th Cir. 1996) (quoting *Gray v. Univ. of Ark.*. 883 F.2d 1394, 1398 (8th Cir. 1989). To determine whether recusal is necessary, the court applies an objective standard.

Id. "It is the appearance of bias or partiality that matters here, not actual bias." Id. District judges are also charged with the duty "to avoid unnecessarily disqualifying himself." *United States v. Walker*. 920 F.2d 513,516 (8th Cir. 1990). "A recusal or disqualification motion is committed to the sound discretion of the trial judge and the standard of review on appeal is whether the judge abused his or her discretion." *Id.* (citation omitted). In *Walker*. the court affirmed the district court's decision not to recuse even though the district court had engaged in an ex parte contact with the prosecution, because there was a long time lapse between said contact and the actual sentencing, and that nothing in the judge's overall conduct demonstrated that he was legally oppressive or hostile toward the defendant. *Id.* at 517.

In determining whether recusal is warranted, Judge Breyer, writing for the First Circuit noted:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure the public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied-Signal. Inc .. 891 F.2d 967, 970 (1st Cir. 1989).

In *Nichols v. Alley*. the Tenth Circuit listed a number of areas that are frequently alleged as a basis for recusal that usually do not warrant it,

including rumor, speculation and similar non-factual matters, baseless personal attacks on the judge and threats or other attempts to intimidate the judge. 71 F.3d 347,351 (10th Cir. 1995).

The Court finds that the allegations made in Petitioner's motion fall into the categories of rumor/speculation and/or an attempt to intimidate the judge. Other than his self-serving testimony, Petitioner did not provide any evidence to support the assertions made in this motion. Prior counsel, Thomas Bauer, provided sworn testimony to the Court in which he acknowledged working in the same office as the undersigned approximately thirty years ago. (6/02/09 Hearing Transcript, p. 10.) He further testified that he has not socialized with the undersigned during the last fifteen year period, other than possibly exchanging words at professional gatherings. (*Id*., p. 11-12.) He further denied telling Petitioner that he watched pornographic films with the undersigned at his home, and that he has never been at the undersigned's home, nor does he know where the undersigned lives. (*Id.*, p. 9, 4/27/09 Hearing Transcript, p. 7.)

In addition to the unsubstantiated allegations made concerning the relationship between Bauer and this Court, Petitioner has also made no showing that this Court made any improper rulings that were affected by any alleged bias. In fact, Petitioner conceded that this Court ruled in his favor as to a contested sentencing issue.

Based on this record, the Court finds no basis in fact or in the law upon which a reasonable person would question this Court's impartiality. Given the baselessness of this motion, the Court finds that current counsel for the Petitioner breached his duty of candor to the Court by adopting Petitioner's motion to recuse in his memorandum of law filed May 29, 2009. The Court acknowledges that it is

counsel's duty to represent the interests of his client. Concomitant with that duty, however, is the duty of candor to the Court. This duty requires that counsel not promote, in any way, motions of a client that have absolutely no basis in law or in fact. Yet in this case, counsel adopted Petitioner's *pro se* motion to recuse in his memorandum of law filed on May 29, 2209 (Doc. No. 55), even though Bauer had already denied the Petitioner's allegations in sworn testimony before the Court. (4/27/09 Hearing Transcript, p. 7.) With no evidence supporting the motion, other than Petitioner's self-serving allegations, counsel's apparent adoption of the motion to recuse did not serve the interests of justice, rather it served only to spread utterly baseless rumors.

The motion to recuse will be denied.

B. Habeas Petition

Under 28 U.S.C. § 2255, [a] prisoner in custody under sentence . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Failure to raise an issue on direct appeal constitutes a procedural default, and it may bar a petitioner from raising the issue for the first time in a § 2255 motion. *Dejan v. United States*. 208 F.3d 682, 685 (8th Cir. 2000) (citing *Bousley v. United States*, 523 U.S. 614, 621-22 (1998); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (finding that a motion under 28 U.S.C. § 2255 does not substitute for a direct appeal).

Petitioner did not file an appeal after sentencing, therefore Petitioner is procedurally defaulted from raising the claims in this § 2255 motion. Dejan, 208 F.3d at 685; Matthews, 114 F.3d at 113. However a

court may excuse a default where the petitioner demonstrates: (1) a cause that would excuse the default; and (2) prejudice or actual innocence. *McNeal v. United States*. 249 F.3d 747, 749 (8th Cir. 2001) (citation omitted); *Matthews*, 114 F.3d at 113. Petitioner does not address cause, prejudice, or actual innocence in his § 2255 motion. Thus, the Court cannot excuse the procedural default on these bases.

Notwithstanding the above, Petitioner may still be able to excuse the procedural default if he demonstrates ineffective assistance of counsel. Claims of ineffective assistance of counsel may fulfill both the cause and prejudice requirements to excuse a procedurally defaulted claim. *Boysiewick v. Schriro*, 179 F.3d 616,619 (8th Cir. 1999). In order to prove ineffective assistance of counsel, a petitioner must demonstrate: (1) counsel performed deficiently; and (2) that counsel's deficient performance prejudiced the decision against him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

When examining the first prong of the *Strickland* test, a court may consider counsel's performance deficient if it fell outside "the wide range of reasonable professional assistance." *Id.* at 689. However, it is strongly presumed that counsel's performance falls within that "wide range of reasonable professional assistance." *Id.* A petitioner may satisfy *Strickland*'s second prong by showing that but for the counsel's errors, the court would have made a different decision in petitioner's case. *Id.* at 691. The analysis does not need to start with the first prong. When the petitioner cannot show prejudice under the second prong, there is no need to look to the reasonableness of counsel's behavior under the first prong. *Id.* at 697.

Petitioner claims that he received ineffective assistance of counsel from attorney Thomas Bauer.

He claims that Bauer was not in tune with his case from the beginning, and that he was hard to reach on the phone when the Petitioner needed to speak with him. Bauer only visited him twice in jail, and did not show him any paperwork as to motions he had filed on Petitioner's behalf. He also claims that Bauer used scare tactics to get him to enter a plea of guilty in this case.

In response to this Petition, Bauer provided sworn testimony to the Court concerning his representation of Petitioner. At the June 2, 2009 hearing, Bauer testified that prior to his being charged by Information in this case, he met with Petitioner and discussed the evidence against him. (6/02/09 Hearing Transcript, p.32.) Bauer testified that Petitioner told him not to worry about what may be contained on Petitioner's computer, as he had erased all the pictures depicting child pornography. (*Id.*) Bauer testified that he strategically chose not to hire a computer forensic expert to aid in his defense. (*Id.* p. 33, 35-36.) The Petitioner had told Bauer that his computer was "full of pornography", thus in order to keep the focus off of the computer, Bauer believed it best to proceed with a plea agreement, especially in light of the fact that the Petitioner had admitted to having sex with K.S.H. (*Id.* p. 33-34.)

Bauer further testified that he had regular contact with Petitioner prior to his plea in this case. (*Id.* p. 34-35.) When the plea agreement and waiver of indictment were sent to Bauer, Bauer testified that he went over those documents in great detail with Petitioner prior to his plea hearing. (*Id.* p. 35.) Bauer also testified that he never told Petitioner he could work out a deal so that Petitioner would serve less than a fifteen year sentence on the federal charge. (*Id.* p. 37.)

Prior to sentencing, Bauer recommended to Petitioner that he retain the services of another

attorney, Rick Mattox. (*Id.* p. 38.) Petitioner testified that he had a fair amount of confidence in Mr. Mattox and that Mr. Mattox was always available to take Petitioner's calls. (*Id.*, p. 62-63.) Petitioner further admitted that he had the opportunity to talk with Mr. Mattox about withdrawing his plea, and that he did talk about this issue with Mr. Mattox, but that he decided to go ahead with sentencing. (*Id.* p. 61-62.)

To prevail on his claim of ineffective assistance of counsel, Petitioner must show that Bauer's conduct in recommending that Petitioner enter into the Plea Agreement fell below an objective standard of reasonableness, and he must show prejudice in that but for Bauer's errors, he would not have entered into a Plea Agreement with the government.

Despite his many complaints of Bauer's performance, Petitioner has not shown that if he had received different legal advice, he would not have entered into a plea agreement and proceeded to trial. Furthermore, based on the record in this case, the Court finds that counsel's conduct was objectively reasonable.

As mentioned previously, the Petitioner admitted to the charged conduct during his plea colloquy. (P.T. p. 20.) He also stated that he was satisfied with the representation provided by Bauer, that Bauer went over the evidence with him, as well as trial strategies and defenses. (*Id.* p. 17-18.) There is evidence in the record that Bauer fully advised Petitioner of all available defenses, his right to have a grand jury review the charges against him and other pretrial strategies prior to the plea hearing. Petitioner now alleges that Bauer erred in not obtaining the services of a computer forensic expert, suggesting that the pictures upon which the federal charges were based were photo-shopped. As discussed previously, however, Bauer testified that he chose not to pursue

this strategy based on Petitioner's representation that he had child pornography on his computer other than the pictures that are the subject of the charged offense, and because of Petitioner's admissions of having sex with the minor victim. (6/02/09 T., p. 33.)

Petitioner also argues that this Court did not have jurisdiction to accept Petitioner's guilty plea for two reasons: 1) the inadequacy of counsel undercuts the competence and jurisdiction of this Court; and 2) Petitioner did not properly waive his right to be prosecuted by an indictment.[2] As discussed above, Petitioner's claim of ineffective assistance of counsel is without merit.

There is also no merit to the claim that Petitioner did not properly waive his right to be prosecuted by an indictment. It is Petitioner's position that an indictment must be issued before it can be waived. In this case, an indictment was never returned by a grand jury.

Rule 7(b) of the Federal Rules of Criminal Procedure provides:

> An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights- waives prosecution by indictment.

There is nothing in this rule which requires that an indictment must first be returned before it can be waived. In addition, where a constitutional provision confers a right, such as a right to be confronted by witnesses and to be charged by indictment, such

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[2] The Court will address this argument, even though appointed counsel did not adopt such argument in his memorandum of law filed on Petitioner's behalf.

right can be waived. *Barkman v. Sanford*, 168 F.2d 592, 593 (5th Cir.) *cert. denied* 332 U.S. 816, 68 S.Ct. 155, 92 L.Ed. 393 (Nov. 10, 1947).

Finally, Petitioner claims that his plea was involuntary and unknowing. The record does not support this claim, however. As noted above, during his plea colloquy, the Petitioner was advised of the constitutional rights he was entitled to, but would give up, if he entered a plea of guilty to the crime charged. The Petitioner was also asked if he understood those rights, and he indicated to the Court that he did. He also informed the Court that no threats or promises were made which would have influenced his decision to enter a guilty plea, and that he was clear-headed. (P.T., p. 17.) Finally, he stated the his decision to enter a plea of guilty was done voluntarily, knowingly and intelligently. (P.T., p. 18.)

Petitioner now asserts that he was not clear-headed during his plea hearing, as he had taken two Ativans that morning, which is a prescription drug used to treat anxiety disorders. (*Id.* p. 50.) At his plea hearing, Petitioner did not inform the Court that he was taking, or had taken, this prescription drug. In fact, he stated that he was clear-headed. (P.T., p. 17.) In addition, Petitioner did not submit any evidence to the Court that he has ever been prescribed Ativan. There is thus no evidence, other than his self-serving testimony, to support Petitioner's claim that his plea was not knowing or voluntary.

Because Petitioner's claims fail to meet the applicable legal standards, the Petition must be denied.

Based on all the files, records, and proceedings herein, it is HEREBY ORDERED that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. No. 32] is DENIED. The

Petitioner's Motion to Recuse [Doc. No. 36] is DENIED.

Date: July 1, 2009

/s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court